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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 356

WINTER REALTY & CONSTRUCTION CO.,
Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION

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September 27, 1945.

SUBJECT INDEX

CASES CITED

OTHER CITATIONS

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The petition presents two questions:

(1) The effect of the negligent inaction of a Federal administrative officer,* and

(2) Whether the Circuit Court of Appeals, under the *Dobson* case, 320 U. S. 489, had power to reverse the Tax Court on a question of tax accounting.**

The respondent's Brief in Opposition asserts that the decision of the first question would not be decisive of the case and that the question is unimportant. With respect to the second question, it asserts that the decision of the Circuit Court of Appeals was on a question of law.

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*This issue is also presented by the petitions in *Flushingside Realty & Construction Co.* v. *Commissioner,* No. 357, and *Twinboro Corporation* v. *Commissioner,* No. 358.

**This issue is also presented by the petition in No. 357.

I. The Negligent Failure of the Commissioner of Internal Revenue to Act upon the Petitioner's Application was Considered Decisive of the Case by the Circuit Court of Appeals. For this Court to Refuse to Consider that Question would Deprive the Petitioner of any Possibility of Review.

The Tax Court decided the case "as if" the Commissioner had granted permission to establish a replacement fund (R. 37). It found, however, that no fund was established because:

(1) The form of the book entries was not proper (R. 38), and

(2) Although the awards were partially invested in real estate mortgages (R. 21), such investments were not proper investments for a replacement fund (R. 38).

Accordingly, the petitioner's argument in the Circuit Court of Appeals was mainly directed to the above propositions.

The Circuit Court of Appeals refused, however, to decide the case upon the grounds stated by the Tax Court. It said (R. 108):

> "* * * The form of the 'fund' is not prescribed, and, arguendo, we may assume that entries upon the owner's books, such as the taxpayer here carried, if supported by bank deposits, or mortgages, would be permissible. For example, the regulation reads: 'he may obtain permission to establish a replacement fund in his accounts in which * * * the compensation * * * shall be held.' * * *"

And again (R. 109):

> "Since the taxpayer at bar did not get permission, it became entitled to the exemption only so far as it in fact 'expended' the money in buying 'similar property'; for the Commissioner's inaction, however negligent, was certainly not a performance of the condition, and the Commissioner could not be estopped. * * *"

The respondent incorrectly says (Br. 11) that the lack of permission by the Commissioner was an "additional" ground of affirmance. It was the *only* ground of affirmance, the court below having expressly refused to rely upon the grounds stated in the Tax Court's opinion.

We do not mean to state that the Circuit Court of Appeals expressly decided that the Tax Court's views were wrong; its disapproval was only an inferential one derived from its failure to adopt the Tax Court's views as the basis for its own decision. It had two choices:

(1) It could state that it agreed with the Tax Court that the form of the fund and its investment was improper, and add as an additional reason for affirmance the negligent failure to act on the application for permission to establish the fund; or

(2) It could, as it did, "assume" (without deciding) that the Tax Court was wrong in its decision on the form of the fund and the investments, and base its decision *solely* on the failure of the Commissioner to act upon the application.

Accordingly, the petitioner has never had appellate review of the decision of the Tax Court as to the form and

investment of the fund, and it can never have such review unless this Court decides whether the ground upon which the Circuit Court of Appeals *did* decide the case was proper.

II. A Question Involving the Negligent Inaction of a Federal Administrative Officer is an Important One.

The respondent (Br. 15) claims that the question is unimportant because it "appears to be unique in the 24-year history of the administration of similar provisions in all Revenue Acts". We do not doubt that failure on the part of a Federal administrative officer to take any action upon an application for so long a period is unique, but that does not prevent a decision that such action may deprive a citizen of substantial rights from being important. The question is not limited to cases arising out of the Federal revenue laws; it is one of general application to all Federal administrative officers.

Nor is the question academic. The Commissioner's determination was that tax was due from the petitioner because the awards had not been "forthwith" expended in the establishment of a replacement fund (R. 16). He did not base his determination on the theory that the replacement fund had not been expended quickly enough in the purchase of similar property. Of course, as the respondent states (Br. 14), the petitioner "is not entitled to be in any better position today than it would have occupied if the application had been granted as requested", but who is to say what that position would have been? If the Commissioner had acted promptly upon the petitioner's 1932 application and set a time within which the fund should be expended in the purchase of similar property (as is customary), we cannot assume that the petitioner would not have complied.

The respondent also observes (Br. 14) that this proceeding involves the redetermination of a tax deficiency and is not an appropriate proceeding in which to test the petitioner's right to secure administrative consideration of his application to establish a replacement fund. But the petitioner could not have known prior to the Commissioner's determination of its tax liability whether the Commissioner would or would not act upon its applications. By that time, mandamus, at best an uncertain remedy, had become wholly inadequate. As the respondent states (Br. 15), mandamus could not have compelled the granting of permission, and the statute provides that the award be "forthwith" expended in the establishment of a replacement fund.

III. The Method of Accounting Applied by the Tax Court is not Forbidden by the Applicable Statute and Regulations.

The respondent (Br. 15-18) takes the position that the statute and regulations in force in 1936 compelled the Tax Court to hold that what was done with the awards received in 1932 and 1935 affected the taxability of the award received in 1936. But the statute and the regulations are silent on the question of whether the application of awards received in prior years affects the taxability of an award received in 1936.

The respondent claims that the Tax Court and the Circuit Court of Appeals decided a question of law, namely the interpretation of the following sentence contained in Section 112(f) of the Revenue Act of 1936:

> "If any part of the money is not so expended, the gain, if any, shall be recognized, but in an amount not in excess of the money which is not so expended."

There is obviously no guide in the above quotation to the decision of the question whether each year should be considered separately or several years should be treated together.

All Federal taxes are levied by statute, and, accordingly, in the last analysis, every tax case involves an interpretation of the law. However, as this Court pointed out in the *Dobson* case, 320 U. S. 489, 507, where the statute "gives no inkling as to the correctness or incorrectness of the Tax Court's view * * * we can find no compelling reason to substitute our judgment". In that case as here, the Government urged that the Tax Court's decision was based upon a statutory provision. This Court said, however (p. 503):

> "Viewing the problem from a different aspect, the Government urges in this Court that although the recovery is capital return, it is taxable in its entirety because taxpayer's basis for the property in question is zero. The argument relies upon § 113 (b) (1) (A) of the Internal Revenue Code, which provides for adjusting the basis of property for 'expenditures, receipts, losses, or other items properly chargeable to capital account'. This provision, it is said, requires that the right to a deduction for a capital loss be treated as a return of capital. Consequently, by deducting in 1930 and 1931 the entire difference between the cost of his stock and the proceeds of the sales, taxpayer reduced his basis to zero. But the statute contains no such fixed rule as the Government would have us read into it. * * *"

So here, Section 112(f) "gives no inkling as to the correctness or incorrectness" of the Tax Court's decision on the matter of accounting. The ambiguity of the statute is highlighted by the fact that it was expressly amended in

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rule of accounting and also, perhaps, by court below was first of opinion that the of accounting was the proper one (*Wil- Co., Inc.* v. *Commissioner,* 78 F. (2d)

Respectfully submitted,

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